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## Bottoms up? Not just yet... the 2012 Minimum Pricing legislation put to the Advocate General's test...

Posted on [September 5, 2015](#) by [aandreangeli](#)

Controversial legislation always keeps the mood and attention of commentators rather alert and the 2012 Alcohol (Minimum Pricing) (Scotland) Act has been no exception. Come September 3 and while it cannot be said that the wait is over, it is certainly clear that the proceedings before the CJEU have reached a keystone, namely the Opinion of AG Yves Bot.

While this Opinion will keep commentators entertained for several months to come and until we have a final ruling, several points are worth making...

First of all, in respect of the nature of the MPU as a restriction on trade among member states, it is of great interest the fact that the Advocate General has addressed not just the question of whether this measure should represent a measure having equivalent effect to a quantitative restriction (MEQR) but also whether it could be characterised as a selling arrangement. Clearly, and maybe not surprisingly, the Advocate General took the view that the correct way to characterise these measures would be to regard them as MEQRs: to the extent that the MPU legislation mandated upon undertakings engaged in alcoholic beverages' sales in Scotland the reaping of a "compulsory minimum profit margin", it had the effect of "cancelling out" any price advantage stemming from lower costs, thus making access to the Scottish market more difficult for cheaper foreign goods that could have relied, conceivably, on that advantage to make themselves more attractive. As to the applicability of the Keck principles to the Act, the fact of this or of any restraint on trade being *prima facie* caught in this category did not exempt them from an assessment conducted in light of the Treaty free movement of goods: thus, they could have only escaped being caught by Article 34 if it could have been shown that they were not "discriminatory", i.e. capable of placing non-domestic good at a disadvantage. In the event, AG Bot expressed the view that since the Act resulted in the competitive advantage characterising cheaper foreign goods being *de facto* "cancelled out" by the compulsory minimum profit margin it commanded, it had such an effect.

Thereafter, the question of whether the restraints in issue could have benefitted from the application of Article 36 TFEU was examined, with a number of interesting and in many ways encouraging (especially for the Scottish Government) observations as to the extent to which minimum prices could be suitable to attaining public interest goals. AG Bot expressed the view that introducing such measures did not only represent an "appropriate response" to the need to tackle serious health and social harm (as the one stemming from hazardous alcohol consumption in Scotland) but could also be regarded as a "systematic" and "coherent" way of addressing these concerns.

The 'necessity' assessment was, however, admittedly far less reassuring for the Scottish authorities... The Advocate General confirmed that the 2012 Act had a clear "deterrent effect" and could have resulted in a loss of sales especially for the beverages in the "lowest end" of the market. However, in his view the central question was to what extent there were alternatives to the MPU that were capable of attaining the same type and level of public policy gains, while being less restrictive of the freedom of movement of goods than the 2012 Act. A general increase in the indirect taxation on the sale of alcoholic beverages—as it has occurred, for instance, in the context of the trade in tobacco products—came inevitably in the frame of that assessment.

AG Bot recognised that tax hikes were undoubtedly less controversial in light of the internal market rules, due to their being generally applicable as well as not capable of restraining the freedom to compete on price. It was also noted that their impact could have been more pervasive in terms of attaining its aim of improving public health

generally: the Advocate General observed that imposing higher indirect taxes on alcohol sales seemed capable of having an impact on consumption not only among lower tier consumers but also among drinkers belonging to middle-income social milieus; in his view, this move could have resulted in reducing health harm across the board and not only in the “target social layer”. On that basis it was stated that while it remained open to the member states to choose to introduce a minimum price-per-unit framework for the purpose of improving public health among their population, on account of their restrictive impact on the free movement of goods they were under an obligation to show that these measures had “additional advantages or fewer disadvantages” than other, *prima facie* equally appropriate measures. Importantly, the Advocate General made clear that the circumstance that alternative measures could yield additional benefits for public health “at large” could not be relied upon to exclude their adoption in favour of MPU rules.

So much for the assessment of the MPU against the background of the free movement rules... it may be argued that the AG Opinion is broadly consistent with the existing approaches characterising the CJEU case law. However, a few more general points are worth highlighting for the benefit of further discussion in competition law circles: one has to do with the changing nature of the Common Agricultural Policy, which is now a field falling within the shared competence of the EU and of its member states. It should be noted that for AG Bot, this should not be regarded as a “market free zone”, which is interesting in the face of current debates on pricing of key agricultural commodities, such as milk and of concerns as to the increasing market power of purchasers vis-a-vis farmers. The second relates, instead, to the relation between the CJEU and the national courts as the latter look to apply a preliminary ruling to the facts at issue in the proceedings that have led to the reference... It is undeniable that AG Bot emphasised the cooperative and egalitarian nature of this interplay, thus calling forcefully the referring to court to conduct the ‘appropriateness’ and ‘proportionality’ assessment of the MPU in light of all available evidence and within the requirements of national autonomy and of overall due process. Nonetheless it is equally clear that this leaves the Court of Session with a complex task which, due to the heated political undertones of the legislation, is going to present its own challenges.

And finally... what now for resale price maintenance? Due to the nature of the MPU as *de facto* representing “statutory RPM”, it may legitimately be queried whether the forthcoming ruling may have a bearing on the ongoing debate as to whether we should move from regarding resale price maintenance as a ‘by object’ infringement of Article 101 to assessing it instead as a ‘by effect’ restriction on competition. It is acknowledged that the confines of the reference did not allow the analysis of these questions: however, it is expected that issues arising from the application of the legislation to future sales’ contracts and especially on the extent to which the latter may be held to be against the competition rules on account of having to conform to the minimum pricing rules may well become live in the event of the 2012 Act being allowed to stand. On this point, it is reminded that especially after the CIF preliminary ruling (Case C-198/01, [2003] ECR I-8055), the space for invoking the observance of obligations stemming from national legislation has become very constrained.

Nonetheless, it can legitimately be suggested that the opinion gives some food for thought when it comes to considering to what extent the attainment of high levels of public health may provide a justification for restraining the freedom to set prices in markets in “harmful” goods such as alcohol. Given the admittedly cautious but still potentially promising endorsement of the MPU scheme as an “appropriate means” to securing high levels of public health, one may legitimately wonder whether time may be ripe for looking again at resale price maintenance that may be motivated by *prima facie* public policy objectives (such as past experiments in the field of book sales, as the reference to Fachverband reminds us). In light of the AG Bot’s appraisal, one could certainly expect that any such arrangement may have to clear high hurdles when it comes to meeting the requirements enshrined in the “negative conditions” of Article 101(3). Nonetheless, the Advocate General seems to suggest that this is not going to be impossible for undertakings conceivably seeking to rely on Article 101(3) for the purpose of avoiding the sanction of nullity that could befall agreements containing a minimum pricing clause—even one that is “mandated” by domestic legislation.

Article 101(3), however, may not be the only avenue through which resale price maintenance clauses that may

avoid the consequences of infringing the Treaty competition rules. The case law of the CJEU in recent years seems to have indicated a trend toward a more “in-context” approach to reading Article 101(1) of the Treaty in respect of practices facially motivated by concerns of general interest. It is suggested on this point that judgments such as *Meca Medina* (case C-519/04 P, [2006] ECR I-6991) and *Wouters* (case C-309/99, [2002] ECR I-1577) , with their emphasis on the requirements of “appropriateness” and “indispensability”, may well provide the space within which benefits arising from resale price maintenance aimed at securing public policy goals can be assessed against the loss of competition they can entail.

In conclusion, AG Bot’s Opinion reminds all of us of the complexities arising from the interplay of the single market principles with other delicate objectives of general interest, on which member states claim (legitimately) the right to set out what their agenda is going to be. Beyond the legal niceties, therefore, there are wider political and societal concerns that make the job entrusted with the Court of Session very difficult and sensitive. Walking on the tightrope of balancing out the needs of open markets with the demands of the protection of the citizens of Europe is a perilous and in many way invidious job—yet, there is every reason to think that the Court of Session will rise to the challenge of having to apply the forthcoming ruling to the case pending before it. As for the impact on wider legal principles, including those of competition, we will have to wait for the next instalment of this long-running and fascinating saga... no time as yet to clink the glasses for us!

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